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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 164

FURMAN GUTHRIE SPENCER, *Petitioner*,

v.

THE UNITED STATES

On Petition for a Writ of Certiorari to the United States Court of Claims

PETITIONER'S REPLY MEMORANDUM

If obfuscation is the office of a Brief in Opposition, then the document filed by the Government in this cause discharges its function with admirable thoroughness. But since we feel that this Court will better be able to weigh the public importance of the issues involved if those issues are presented clearly and accurately, we deem it appropriate to add a few words.

I. The New Army Regulations Relied Upon by the Government Involved no Change Whatever in Substance.

The Government apparently agrees with petitioner that the changed retirement system instituted by Title IV of the Career Compensation Act of 1949 (37 U. S. C. [Supp. III *et seq.* to 1946 ed.] 271-285) does not of itself militate against the public importance of the present case; rather the Government rests its opposition on the circumstance that the Army Regulation on which petitioner bases his substantive case has been superseded (Br. Op. 6, 11-12).

Actually, however, not only did the supersession effect no change at all in substance, but the Government's position completely misapprehends the nature of the right asserted, and, through its disregard of the Reservist's rights, underscores the need for this Court's review.

Par. 36*b*, AR 605-250, 28 March 1944, provided that:

> Orders for retirement, having become effective in any case, cannot be revoked or amended.

This provision was superseded by par. 38*b*, AR 605-246, 19 May 1949, which provided

> Executed orders for retirement or relief from active duty cannot be revoked or amended.

This, on its face, does not change the status of executed retirement orders, i. e., those which have become effective, but simply places the seal of equal finality on orders for relief from active duty.

But the Government says (Br. Op. 11-12) that * * *

> Section 38b of A. R. 605-246 eliminated this problem [of distinctions between Reserve and Regular officers] by providing that executed orders, *both for retirement* (*regular officers*) *and for relief from active duty* (*reserve officers*), "cannot be revoked or amended." Reserve officers were thus assured that orders for relief from active duty following retirement proceedings

> would be accorded the same finality as that previously given retirement orders of regular officers under Section 36b of A. R. 605-250.

We have added the italics in the quotation to emphasize the assumption, the utterly false assumption, that only Regulars are entitled to retirement, and that retirement for Regulars and relief from active duty for Reserves are equivalent concepts. The fact is that, since 1939, Reserves have been entitled to retirement for disability equally with Regulars, see the statutory development summarized at Pet. 9-11, and that a Reserve officer's relief from active duty has nothing to do with retirement, and, contrary to the quoted statement, may and frequently does precede it. Retirement involves his entitlement to retired pay, either for disability as under the statutes involved in this case, or for long and meritorious service under Title III of the Act of June 29, 1948, c. 708, 62 Stat. 1081, 1087-1090 (10 U. S. C. [Supp. II *et seq.* to 1946 ed.] 1036-1036i); relief from active duty, on the other hand, involves his return to civilian status, and his release from military jurisdiction.

These differences need not rest on assertion; they are graphically demonstrated by the cases that uphold the right of the Reservist to receive retired pay in the interval between his release from active duty, back to civilian status, and the time that his entitlement to retired pay was established. See *Womer* v. *United States*, 114 C. Cls. 415; *Hamrick* v. *United States*, 120 C. Cls. 17; cf. 30 Comp. Gen. 40. If retirement were equivalent to relief from active duty, or if his retirement preceded such relief—and both assumptions underly the Government's position—then the cited cases could never have arisen.

The Government's argument not only reflects a complete misapprehension of retirement procedures, but, far more ominously, appears to deny that Reserves are ever entitled to retirement. Such a disregard by the Government's law officers of a series of enactments designed by Congress to

ameliorate and equalize the status of literally thousands of citizen-soldiers only serves to emphasize the need for this Court's review of the issues involved.

Nor is the Government on sound ground in saying (Br. Op. 12),

> Since the new regulation was effective with respect to all "executed orders", it removed any basis for petitioner's contention (Pet. 14-15) that the supposed problem in this case affected the thousands of reserve officers who had theretofore been certified as eligible for retirement benefits.

For, unless there is a difference of substance between the 1944 version, "order * * * having become effective", and that of 1949, "executed orders"—and we do not understand the Government as contending that there is—there is no more reason to suppose that the Secretary of the Army will heed the command of the later regulation than he did that of the former. Regardless of the reach of the 1944 provisions standing alone, assuming for purposes of argument that its terms as such were applicable only to Regulars, it was a "regulation" which Congress by the Act of April 3, 1939 (Pet. 17; Br. Op. 14), and the Act of September 26, 1941 (Pet. 17-18; Br. Op. 14-15), made applicable to Reservists. The Secretary disregarded the 1944 provision; how can it be assumed that, if the decision below stands, he will not feel free similarly to disregard the 1949 provision, particularly—and this is another point disregarded by the Government—particularly in view of the rule that the Secretary is not bound by his own regulations. *Denby* v. *Berry*, 263 U. S. 29, 38; *Reid* v. *United States*, 161 Fed. 469, 472 (S. D. N. Y.), writ of error dismissed, 211 U. S. 529; *Smith* v. *United States*, 24 C. Cls. 209.

The fact of the matter, once the governing statutes, procedures, and concepts are clearly understood, is that, under the decision below, every one of the 35,000-odd reserve re-

tirements effected prior to the effective date of the Career Compensation Act of 1949 is in potential jeopardy.

II. The Doctrinal Inconsistency Between the Ultimate Opinion Below in this Case and the Opinion Below in the Carlin case Still Remains.

The Government says (Br. Op. 10) "it is clear that this case and the *Carlin* case turned ultimately on a disagreement as to the sufficiency of the new evidence to support the Secretary's action."

But the short answer to the foregoing is that the reasoning of the prevailing opinion in the *Carlin* case, 100 F. Supp. 451, is identical with that of the ultimate dissenting opinion here, R. 41-54; 102 F. Supp. 774, 778-784. *Carlin* says flatly that Reserve retirements cannot be reopened; this case holds the precise opposite. The circumstance that the Chief Judge's change of vote in this case can be rationalized on a factual basis with his refusal to change his vote in *Carlin* cannot hide the fact that the two cases cannot be reconciled doctrinally, and that, in consequence, review by this Court is necessary. For cases are still pending that arose out of the Secretary's unilateral revocation of Reserve retirement once granted. E. g., *Loth* v. *United States*, No. 49849, C. Cls. Surely litigants are entitled to have laid down, in the only court competent to entertain their suits, a consistent legal principle against which their rights may be measured.

III. The Government's Substantive Arguments Rest Upon a Disregard of Consistent Rulings of The Judge Advocates General of the Army and Upon an Erroneous Reading of the Record.

Most of the Government's Brief in Opposition (pp. 2, 5-11) is devoted to a discussion of the broad proposition that retirement proceedings, for Regulars and Reserves alike, may be reexamined for newly discovered evidence,

and to one particularized aspect of that proposition, viz., that the Secretary's action in the present case (Br. Op. 9) "was fully justified by the important evidence of petitioner's physical examination by the Veterans Administration in December, 1940, which had not originally been considered by the retirement boards", to wit, the finding of arterial hypertension (Fdg. 5, R. 12-13, 30-31).

These substantive contentions rest on two demonstrably incorrect assumptions, one of law, the other of fact.

First. It is not necessary to inquire whether the generalized principles sought by the Government to be drawn from the experience of other administrative agencies (Br. Op. 8-11) break down against the positive command of finality contained in the 1944 Army Regulation, for the reason that the specific question here in issue has been decided again and again. Consistent rulings of The Judge Advocates General of the Army—which are neither cited nor discussed by the Government—have made it clear that, in the absence of fraud, retirement proceedings once approved cannot be reopened, regardless of the character of the new evidence. Dig. Op. JAG, 1912, p. 987, par. I B 3 d (citing rulings from 1892 to 1907: "when the power has been once fully exercised it is exhausted as to the case"); Dig. Op. JAG, 1912, p. 992, par. I E ("the order by which such retirement was effected can not subsequently be revoked or modified * * * nor can the action be reopened by a new Secretary of War"); Dig. Op. JAG, 1912, p. 1003, par. II G (same, as to retired enlisted man); Dig. Op. JAG, 1912-1940 par. 326(1), pp. 134-135; 2 Bull. JAG 464, par. 324; see also 8 Bull. JAG 22, par. 892a.

The ruling perhaps closest in point is the one made in 1943, and reported at 2 Bull. JAG 464, par. 324: In the case of an officer retired for disability, even if it should appear from the record or from information derived from any other source that he is not in fact incapacitated, the retirement cannot be revoked so as to restore the officer to

the active list once he has actually been placed on the retired list.

In view of these rulings, it is hardly necessary to consider the other infirmities in the Government's argument under this heading.[1]

Second. The record establishes that, in fact, the present cause is not a case of newly discovered evidence at all. The finding of arterial hypertension made by the Veterans' Administration in December 1940 did not in any sense constitute novelty; the Army itself, examining petitioner four months earlier, had likewise found him to be suffering from arterial hypertension (Fdg. 3, R. 12, 30). It is therefore apparent that what the Veterans' Administration found was simply what the Army itself knew, and there is no word in the record even tending to suggest that the retirement boards were unaware of the Army's own August 1940 examination. Anyone familiar with Army procedures could fairly assume that the boards had before them and considered those records.

Therefore this is not a case where a retirement proceeding was reopened by the Secretary for newly discovered evidence, but one where the reopening was on pretext of newly discovered evidence, for evidence that at best was no more than cumulative.

The result is that, since a Regular officer's retirement could not be—and never has been—reopened in the absence of fraud, and since the regulations so stating (including,

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[1] Fraud, of course, stands on a different footing, because official action induced by fraud is always voidable, even in the solemn field of naturalization (*Knauer* v. *United States*, 328 U. S. 654), or in public land matters, where normally a high degree of conclusiveness attaches to administrative action (*West* v. *Standard Oil Co.*, 278 U. S. 200, 219; *Cameron* v. *United States*, 252 U. S. 450, 464; *United States* v. *Minor*, 114 U. S. 233, 243-244).

Fraud is therefore specifically recognized as an exception to the rule of finality in retirement proceedings. See Dig. Op. JAG 1912-1940, p. 135 (penultimate subparagraph).

necessarily, the course of administrative decision thereunder) were legislatively made applicable to Reservists, it follows that the present case involves no obvious discrimination against the non-professional citizen-soldier in palpable violation of the Congressional command of equality of treatment.

Standing alone, obviously, that circumstance would not warrant review by this Court. But since both the court below and the Government rest the resultant discrimination on a broadly generalized doctrinal basis, and since in fact, as we have shown, the doctrines thus espoused can be availed of to despoil thousands of former Reservists, it follows that this case does present issues of public importance, and so warrants and indeed requires decision by this Court.

CONCLUSION

For the foregoing additional reasons, we respectfully submit that the petition for certiorari herein should be granted.

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September 1952.